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IN THE

Supreme Court of the United States

October Term, 1962

No. 432

LACY MATHEW THOMPSON
Petitioner

— vs —

STATE OF NORTH CAROLINA
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of North Carolina entered in the above entitled case on June 15, 1962.

Citations To Opinions Below

The judgment of the Superior Court of Alamance County was entered without opinion. The opinion of the Supreme Court of North Carolina, printed in the Appendix hereto, infra, (R p. 7) is reported in 257 N. C. 452 S.E. 2d

Jurisdiction

The judgment of the Supreme Court of North Carolina was entered on June 15, 1962 (R p. 7). The Jurisdiction of the Court is invoked under 28 U.S.C Section 1257 (3).

The issue presented in this petition for writ of certiorari was raised in the Supreme Court of North Carolina by assignment of error three (3) in that in assignment of error three (3) defendant contended that there was no evidence to permit the Jury to find that the defendant was under the influence of intoxicating beverages. Defendant contended that the charge that he was under the influence of alcoholic beverages was totally devoid of evidentiary support. In fact, that the conviction did not rest on any evidence at all. (See Thompson v City of Louisville U.S. ; 80 S. Ct. 624. The Supreme Court of North Carolina found no error. See (R p. 7). The question as to whether there was any evidence at all to sustain a conviction for driving under the influence of alcoholic beverages was not artfully raised in the Superior Court of Alamance County. Defendant in this court was without benefit of Counsel, but in spite of this the record there shows an absence of evidence upon which to convict for the charge of driving under the influence of alcoholic beverages. However, it was in that court that defendant's uncontrodicted evidence showed that he requested a blood test at his own expense to determine the alcoholic content of his blood at the time as evidence that he was not under the influence of alcoholic beverages. The defendant's request was refused and no instructions of law based on defendant's contentions were given to the jury by the trial judge in his charge.

Questions Presented

1. Whether the charge of driving under the influence of intoxicating liquor, bitters, morphine or other opiates is so devoid of all evidentiary support as to deny defendant due process of law under the fourteenth amendment of the Federal Constitution?

2. Whether the failure of the law enforcement officer, to grant defendant's timely request for a blood test at his expense or to give satisfactorily reason for their refusal

denied defendant due process of law under the fourteenth amendment of the Federal Constitution?

3. Can the warrant support a verdict and sentence when it appears that the statute charged to have been violated has been repealed?

Constitutional Provision and Statutes Involved

The constitutional provision involved is: United States Constitution, Fourteenth Amendment, section one, set out in Appendix hereto, infra, p. 6. The statutory provisions involved are 28 U.S.C., Section 1257 (3); Appendix R p. 6; United States Supreme Court Rule 23 (1); and the North Carolina General Statutes, Section 20-138 Appendix (R p. 6) and Section 14-387, repealed, Appendix (R. p. 7).

Statement

The petitioner Lacy Mathew Thompson was arrested on December 17, 1960, and charged on a warrant charging that petitioner did unlawfully, wilfully operate a motor vehicle on the public streets of Graham while under the influence of intoxicating liquor, bitters, morphine, or other opiates.

Petitioner was tried on this charge in the Municipal Recorder's Court of Graham, North Carolina, found guilty and given four months suspended sentence on payment of one hundred dollars ($100.00) and costs. He appealed to the Superior Court of Alamance County, North Carolina, and after a trial de novo at the January, 1962, Criminal Term of Superior Court of Alamance County, was found guilty and was sentenced to confinement in the County jail for a period of eighteen months and assigned to work under the supervision of the State prison department. He then appealed to the Supreme Court of North Carolina, having given notice of appeal in open court, Appearance bond $1500.00, Appeal bond $750.00 The Supreme Court

of North Carolina found no error in State v Lacy Mathew Thompson, 257 NC 452 (1962) See Appendix, Infra (R. p. 7).

In the Superior Court of Alamance County the Petitioner contended that he was not under the influence of alcoholic beverages, bitters, morphine or other opiates and introduced uncontradicted evidence of his request for a blood test at his expense at the time of his arrest, and the refusal of the law enforcement officers to grant it. In the Supreme Court the petitioner contended there was no evidentiary support for conviction on the charge.

Reasons For Granting The Writ

This case involves substantial questions affecting important Constitutional rights.

1. The writ of certiorari should be granted because of its intrinsic importance. When a petitioner is charged with operating a motor vehicle under the influence of intoxicating liquors or narcotic drugs as a violation of a Statute, it would appear that the State should offer some evidence of intoxication from intoxicating liquors or narcotic drugs, since indeed symptoms of intoxication may result from vertigo, anemia, cerebral tumor, eye strain, hemorrhage, multiple sclerosis, neurosis and a host of other factors. (Thompson v City of Louisville, US , 80 S. Ct. 624.

2. Buttressing and supporting petitioner's claim of an entire absence of evidentiary support for conviction under the charge of driving under the influence of intoxicating liquors or opiates is the defendant's contention that the state acting through its law enforcement officers refused to permit him to obtain a blood test at his expense to defend the charge The refusal of the State's Law enforcement officers to give the defendant an opportunity to obtain a blood test at his own expense to secure evidence and present same at the trial for the crime of which he was charged deprived the defendant of his Constitutional Right of due

process of Law under the Fourteenth Amendment of the United States Constitution. Furthermore the defendant contends that this constitutes a deprivation of Governmental fair play. See In Re Newbern 175 Cal. App. 2d 862 (1959), 1 Cal. Rptr. 80, 78 ALR 2d 901; People v Dawson 184 Cal. App. 2d (Adv. 458) of Cal. Rptr. 384 (1960); State v Munsey 152 Me 198, 127 A2d (1956); Breithaupt v Abram 352 U.S. 432.

Further reasons for granting this writ is the importance of the issues presented not only to this defendant, but to all motorists in jurisdictions like the State of North Carolina where the Legislature has failed to act in this matter.

CONCLUSION

WHEREFORE, for the foregoing reason, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

W. G. Pearson, II
Le Marquis De Jarmon
Durham, North Carolina
Attorneys for Petitioner

APPENDIX

Constitutional and Statutory Provisions Relied on:

FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED SATES, SEC. 1

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

28 U. S. C. 1257 (3)

By writ of Certiorari, where the validity of a Treaty or Statute of the United States is drawn in question or where the validity of a State Statute is drawn in question on the ground of its being repugnant to the constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the constitution, treaties or Statutes of, or commission held or authority exercised under the United States, June 25, 1948, c. 646, 62 Stat. 929.

GENERAL STATUTE OF NORTH CAROLINA 20-138

Persons under the influence of intoxicating liquor or narcotic drugs.—It shall be unlawful and punishable, as provided in Sec. 20-179, for any person, whether licensed or not, who is a habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs, to drive any vehicle upon the highways within this State. (1937, c. 407, s. 101.)

GENERAL STATUTE OF NORTH CAROLINA 14-387

Operating automobile while intoxicated.—Any person who shall, while intoxicated or under the influence of intoxicating liquors or bitters, morphine or other opiates, operate a motor vehicle upon any public highway or cartway or other road, over which the public has a right to travel, of any county or the streets of any city or town in this State, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty dollars or imprisoned not less than thirty days, or both, at the discretion of the court, and the judge shall upon conviction, deny said person or persons the right to drive a motor vehicle on any of the roads defined in this section for a period of not more than twelve months nor less than ninety days. (1919, c. 234; 1925, c. 283; 1927, c. 230, s. 1; C. S. 4506.)

STATE

v.

LACY MATHEW THOMPSON

No. 724

SUPREME COURT OF NORTH CAROLINA

Spring Term, 1962

Criminal prosecution on a warrant charging that defendant, on December 17, 1960, "did unlawfully, wilfully operate a motor vehicle on the public streets of Graham while under the influence of intoxicating liquor, bitters, morphine or other opiates, against the statute in such case made and provided, and against the peace and dignity of the State and/or in violation of Town Ordinance, Section _____."

Upon trial *de novo* in the superior court, after appeal by defendant from conviction and judgment in the Graham Municipal Recorder's Court, the State's evidence consisted of the testimony of M. E. Guy, a Graham police officer. Defendant, who was not represented at trial by counsel, cross-examined the State's witness and thereafter testified as the sole defense witness.

The jury returned a verdict of "guilty as charged in the warrant." From judgment, imposing a prison sentence, defendant appealed.

Clarence Ross, B. F. Wood, Graham, W. R. Dalton, Burlington, for defendant-appellant.

T. W. Bruton, Atty. Gen., and Charles D. Barham, Jr., Asst. Atty. Gen., for the State.

BOBBITT, Justice.

(1) Defendant, in his case on appeal, noted five exceptions to the court's charge. Assignments of error Nos. 1 and 2, based on Exceptions Nos. 1, 2, 4 and 5, attack the charge on the ground the court, in reviewing what defendant's evidence tended to show, did not refer specifically to certain portions of defendant's testimony. "The recapitulation of all the evidence is not required under G.S. § 1-180, and nothing more is required than a clear instruction which applies the law to the evidence and gives the position taken by the parties as to the essential features of the case." State v Thompson, 226 N.C. 651, 39 S.E.2d 823. The court's charge complies with this statutory requirement and Assignments of Error Nos. 1 and 2 are overruled.

Assignment of Error No. 3, based on Exception No. 3, attacks this excerpt from the charge: "Now if the State has satisfied you beyond a reasonable doubt that the defendant on the occasion in question was operating a motor vehicle on the public highway of this State, or a public street of the City of Graham at a time when he had drunk a sufficient quantity of intoxicating beverage to cause him to lose the normal control of his mental or bodily faculties, either one

or the other, to such an extent that there was an appreciable impairment of either one or both, then it would be your duty to return a verdict of Guilty as Charged in the Warrant."

(2) Defendant asserts the quoted excerpt is erroneous because the court "permitted the jury to find that the defendant was under the influence of intoxicating beverages when there was no evidence in the record that his intoxication was due to any intoxicating beverages, and permitted the jury to find that the street in Graham was a public street or highway when there was no evidence to that effect * * *." Defendant undertakes, by this assignment of error, to challenge the sufficiency of the State's evidence to warrant submission to the jury. As in State v. Gaston, 236 N.C. 499, 73 S.E.2d 311, defendant did not move for a compulsory nonsuit under G.S. § 15-173, or tender to the court any request for instructions to the jury, or object in any way to any of the proceedings of the superior court preceding the return of the verdict. However, apart from defendant's failure to raise and present the question in apt time and manner, consideration of the evidence in the light most favorable to the State impels the conclusion it was sufficient to warrant submission to the jury with reference to the matters referred to in Assignment of Error No. 3 and otherwise. Hence, Assignment of Error No. 3 is overruled.

(3, 4) Defendant's Assignment of Error No. 4 is directed "to the entry and signing of the judgment." The appeal itself is considered an exception to the judgment and any other matter appearing on the face of the record. "And the record, in the sense here used, refers to the essential parts of the record, such as the pleadings, verdict and judgment." Gibson v. Central Mfr's Mut. Insurance Co., 232 N.C. 712, 715, 62 S.E.2d 320, and cases cited. "An exception to a judgment raises the question whether any error of law appears on the face of the record." Moore v. Owens, 255

N.C. 336, 338, 121 S.E.2d 540; State v. Beam, 255 N.C. 347, 121 S.E.2d 558.

In this Court, defendant moved "to arrest the judgment for that the warrant charges the defendant, disjunctively, with having been under the influence of mutually inclusive substances without stating which of the respective commandments of the statutes he violated."

We now consider the vital question presented by defendant's appeal, namely, whether error of law appears on the face of the record.

A statute, codified as § 14-387 in the General Statutes of 1943, provided: "Any person who shall, while intoxicated or under the influence of intoxicating liquors or bitters, morphine or other opiates, operate a motor vehicle upon any public highway or cartway or other road, over which the public has a right to travel, of any county or the streets of any city or town in this State, shall be guilty of a misdemeanor, and upon conviction shall be fined not less than fifty dollars or imprisoned not less than thirty days, or both, at the discretion of the court, and the judge shall upon conviction, deny said person or persons the right to drive a motor vehicle on any of the roads defined in this section for a period of not more than twelve months nor less than ninety days." This statute was repealed by Chapter 635 of the Session Laws of 1945.

The statute codified as G.S. § 20-138 has been in full force and effect since its enactment in 1937. It provides: "It shall be unlawful and punishable, as provided in § 20-179, for any person, whether licensed or not, who is a habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs, to drive any vehicle upon the highways within this State."

(5) The warrant, while it contains no reference to any specific statute or town ordinance, discloses on its face that it was drafted in the language of former G.S. § 14-387. Even so, the conduct charged in the warrant is a violation of G.S.

§ 20-138. The fact the warrant contains no reference to G.S. § 20-138 is immaterial. State v. Smith, 240 N.C. 99, 81 S.E.2d 263. One purpose of Chapter 635, Session Laws of 1945, which relates to many sections of the General Statutes, was to eliminate unnecessary duplications. In our opinion, and we so decide, the warrant was sufficient to charge defendant with operating a motor vehicle upon the public streets of Graham while "under the influence of intoxicating liquor or narcotic drugs," the language of G.S. § 20-138.

(6) G.S. § 20-138 creates and defines three separate criminal offenses. Under its provisions, it is unlawful and punishable as provided in G.S. § 20-179 for any person, whether licensed or not, (1) who is a habitual user of narcotic drugs, *or* (2) who is under the influence of intoxicating liquor, *or* (3) who is under the influence of narcotic drugs, to drive any vehicle upon the highways within this State. Here, the warrant, in a single count, charges alternatively, that is, in the disjunctive, the commission by defendant of the second or of the third criminal offense created and defined by G.S. § 20-138. See State v. Helms, 247 N.C. 740, 102 S.E.2d 241.

In State v. Williams, 210 N.C. 159, 185 S.E. 661, an indictment, based on G.S. § 90-88, charged in one count, *in the disjunctive*, several separate and distinct criminal offenses. This Court held the defendant's motion to quash, aptly made, should have been allowed. Here, defendant did not at any time move to quash the warrant. Moreover, defendant's motion in arrest of judgment was first made in this Court.

(7) With reference to the drafting of criminal warrants based on violations of G.S. § 20-138, it is appropriate to emphasize: If it be intended to charge only one of the criminal offenses created and defined by G.S § 20-138, e. g., the operation of a motor vehicle upon the public highway within this State while under the influence of intoxicating liquor, the warrant should charge this criminal offense and no

other. If it be intended to charge two or more of the criminal offenses created and defined in G.S. § 20-138, the warrant should contain a separate count, complete within itself, as to each criminal offense.

In a similar factual situation this Court held: "By going to trial without making a motion to quash, he (the defendant) waived any duplicity which might exist in the bill." State v. Merritt, 244 N.C. 687, 94 S.E.2d 825, and cases cited.

(8) In holding defendant has waived the right to attack the warrant on the ground of duplicity, we are not unmindful that defendant was not represented by counsel at trial. Even so, every feature of the trial discloses both the State and defendant considered this criminal prosecution related solely to whether defendant was operating an automobile on the public street of Graham while under the influence of intoxicating liquor. The evidence and charge do not refer in any way to narcotic drugs. In short, the point is technical; and we perceive no prejudice to defendant.

Even so, defendant, relying on State v. Albarty, 238 N.C. 130, 76 S.E.2d 381, contends the verdict, "guilty as charged in the warrant," is invalid for uncertainty in that it is not sufficiently definite and specific to identify the crime of which defendant was convicted. At first impression the point seems well taken; but, as indicated below, consideration of the record in State v. Albarty, supra, discloses a clear distinction between that case and the present case.

With reference to the verdict, there is a distinction between State v. Merritt, supra, and the present case. There the jury found the defendant "guilty of operating a motor vehicle under the influence of intoxicating liquor," but here the verdict was "guilty as charged in the warrant." But there can be no doubt as to the identity of the criminal offense of which defendant was convicted. The court, in instructing the jury, treated the warrant as charging only one criminal offense; namely, the operation of an automobile on the public street of Graham while under the in-

fluence of intoxicating liquor. Whether he was guilty of *this* criminal offense was the only question submitted to the jury; and, as set forth in the excerpt quoted above to which defendant's Assignment of Error No. 3 is directed, the court instructed the jury if they found defendant guilty of *this* criminal offense, it would be their duty "to return a verdict of Guilty as Charged in the Warrant." Immediately thereafter, the court instructed the jury: "If the State has failed to so satisfy you, it would be your duty to return a verdict of Not Guilty."

(9, 10) A verdict, apparently ambiguous, "may be given significance and correctly interpreted by reference to the allegations, the facts in evidence, and the instructions of the court." State v. Smith, 226 N.C. 738, 40 S.E.2d 363; State v. Beam, supra. "The verdict should be taken in connection with the charge of his honor and the evidence in the case." State v. Gilchrist, 113 N.C. 673, 676, 18 S.E. 319, and cases cited; State v. Gregory, 153 N.C. 646, 69 S.E. 674; State v. Wiggins, 171 N.C. 813, 89 S.E. 58. When the warrant, the evidence and the charge are considered, it appears clearly the jury, by their verdict, found defendant guilty of operating a motor vehicle on the public street of Graham while under the influence of intoxicating liquor.

The record in State v. Albarty, supra, discloses: Near the beginning of the charge, the jury were instructed they could return "one of two verdicts, namely: First, 'Guilty, as charged in this warrant;' or second, 'Not Guilty,'" etc. The jury returned a verdict of "Guilty of Lottery as Charged in the Warrant." In concluding the charge, this instruction was given: "Now the Court charges you that if the State of North Carolina has satisfied you, from the evidence and beyond a reasonable doubt, that the defendant, Albarty, on the occasion mentioned in the warrant; to-wit, on or about the 28th day of October 1952 was operating a lottery; that is, had sold *or* bartered, *or* caused to be sold *or* bartered tickets, tokens, or certificates for shares in a lottery

as the Court has defined a lottery to be, either by himself, *or* if he aided and abetted another or others in selling *or* bartering tickets, tokens, or certificates for shares in a lottery, as the court has defined a lottery to be, he would be guilty, as charged in the warrant in this case, and it would be your duty to return a verdict of 'Guilty.' On the contrary, however, if the State of North Carolina has failed to so satisfy you, from the evidence and beyond a reasonable doubt, it would be your duty to acquit him; that is, to return a verdict of 'Not guilty.'" (Our italics) Suffice to say, the court's (quoted) instruction in State v. Albarty, supra, did not remove or tend to remove the ambiguity in the verdict.

The record discloses no error of law deemed sufficient to justify the award of a new trial.

No error.

SHARP, J., took no part in the consideration or decision of this case.

No. 724 **FIFTEENTH DISTRICT**

SUPREME COURT OF NORTH CAROLINA

Spring Term, 1962

STATE

v

LACY MATHEW THOMPSON

From Alamance

Before SUSIE SHARP, Special Judge, January 1962 Criminal Term of Alamance Superior Court, DEFENDANT APPEALED.

ORGANIZATION OF COURT

BE IT REMEMBERED that at the regular January Criminal Term 1962 of the Alamance Superior Court,

which said Court was duly constituted and organized, this criminal action was tried before her Honor, Susie Sharp, Judge Presiding, and a jury, duly sworn and impaneled upon the following warrant:

No. 1475

NORTH CAROLINA ALAMANCE COUNTY
IN THE MUNICIPAL RECORDER'S COURT
OF THE TOWN OF GRAHAM, N. C.
STATE AND TOWN OF GRAHAM, N. C.

v

LACY MATHEW THOMPSON
452 Quintas Avenue, Burlington

Affidavit

M. E. Guy, being duly sworn, deposes and says that Lacy Mathew Thompson, on or about the 17th day of December 1960, with force and arms, at and in the County aforesaid and within the corporate limits of the Town of Graham, N. C., did unlawfully, wilfully operate a motor vehicle on the public streets of Graham while under the influence of intoxicating liquor, bitters, morphine or other opiates, against the statute in such case made and provided, and against the peace and dignity of the State and or in violation of Town Ordinance, Section .

M. E. GUY,
Complainant

Sworn to and subscribed before me, this 17th day of December 1960.

BY (s) NITA McMULLAN
Asst. Clerk Municipal Recorder's Court.

WARRANT for DWD

NORTH CAROLINA ALAMANCE COUNTY
IN THE MUNICIPAL RECORDER'S COURT
STATE AND TOWN OF GRAHAM, N. C.

v

LACY MATHEW THOMPSON

452 Quintas Avenue, Burlington

STATE OF NORTH CAROLINA

To the Chief of Police, or any Policeman of the Town of Graham, N. C., or other lawful officer of Alamance County, GREETING:

For the reason stated in the foregoing affidavit, which is hereby made a part of this warrant, you are hereby commanded forthwith to arrest the said Lacy Mathew Thompson and him have before his Honor, the Judge of the Municipal Court of the Town of Graham, N. C., then and there to answer said charge and be dealt with according to law.

Witness my hand this 17th day of December 1960.

JUDGE, MUNICIPAL RECORDER'S COURT

BY: (s) NITA McMULLAN
Assistant Clerk Municipal Recorder's Court.

Minute Book 1, page 113

Minutes of Graham Municipal Recorder's Court, January 19, 1961. Case No. 1475. STATE v. LACY MATHEW THOMPSON, charge driving under influence; plea, not guilty, defendant found guilty, four months suspended on payment of $100.00 and costs. Appealed March Term Superior Court, $200.00 appeal bond.

(Exception No.).

Minute Docket Book 30, Page 325, Alamance Superior Court:

No. 95. State v Lacy Mathew Thompson. Driving while drunk. Pleads, Not Guilty. This cause coming on to be heard and being heard the following jury as impaneled: (Naming Jury). The jury say for their verdict, guilty as charged in the warrant. Judgment of the Court is that he be confined to the common jail of Alamance County for a period of 18 months to be assigned to work under the supervision of State Prison Department. The defendant in open Court gives notice of appeal to the Supreme Court; further notice waived. Let the defendant give an appearance bond for the sum of $1500.00 and appeal bond in the amount of $150.00.

STATEMENT OF CASE ON APPEAL

This is a criminal action tried at the January Criminal Term 1962 of the Superior Court of Alamance County, North Carolina. The case was appealed from the Graham Recorder's Court to the Superior Court of Alamance County. The defendant was not represented by counsel and cross-examined the witness for the State himself. He also testified in his own behalf. He was convicted by the jury and an active sentence was imposed by the Court. From this sentence he appealed to the Superior Court and assigns the errors hereinafter set forth.

STATE'S EVIDENCE

M. E. GUY, Graham Policeman, testified:

Yes sir, I know Lacy Mathew Thompson and knew him prior to December 17, 1960 just by sight. I saw him on that date and he was operating a 1949 Pontiac two-door sedan on North Main Street in Graham. He turned off North Main Street to the left into East Parker and I was on my way to the City Garage to gas up; it was about 6:30

in the afternoon, and I turned to my right behind him and noticed him operating the car zig-zagging from one side to the other. I followed him on down to Travora Manufacturing Company and got him stopped just beyond Travora. I stopped the car and got Lacy out from under the wheel. Yes sir, I had a conversation with him at that time and asked him what he had been drinking and at first he denied that he had anything to drink, he said he had just gotten off from work, and after observing him I placed him under arrest and took him to the jail. I observed him walk and he was staggering, he talked thick-tongued and his eyes were glassy. In my opinion he was highly intoxicated at the time.

CROSS EXAMINATION (BY THE DEFENDANT)

In reference to the time, it was late in the afternoon, six-thirty-two. Yes, we were both using our headlights. When you first entered East Parker Street off of North Main you were traveling south toward Graham and you made a left-turn off of Main Street into Parker and I observed you on Parker Street. I wasn't at the stop light when you made your left-turn off of North Main Street into Parker. I turned on the same green light, but I wasn't at the light at the time you turned. Yes, I said I followed you and observed your driving. The street is practically level and it does have a slight oval center. The distance between your car and mine when I pulled you over at Travora Manufacturing Company, I would say, ten feet. Yes, I observed you walking between the distance of the cars. I said I was on my way to the City Garage for gas. I don't remember whether I said or that I testified in the lower court *but* I was going to the garage or not, but I was patroling the northern section of Graham and going to the garage for gas, doing both, but I was actually on my way to get gas. You met a couple of cars on East Parker Street. No, you did not run anybody off the highway and it was dark, it

was dusky dark. I was not meeting you and asking you to dim your lights, nor turn around and follow you. You did not ask me when I was carrying you to the Graham Jail-house to call Dr. Charles Kernodle to give you an alcoholic test, you might have asked the jailor. I don't think I heard a word about the Doctor being mentioned and I don't think I testified in the lower Court that I was talking to the jailor when it was mentioned.

STATE RESTS.

DEFENDANT'S EVIDENCE

LACY MATHEW THOMPSON, defendant, testified:

On this particular occasion Mr. Guy arrested me; he also testified I was driving a 1949 Pontiac which I wasn't driving, and I wasn't in one. On the other hand, after he placed me under arrest, he had his patrol car sitting directly behind mine. I looked in the rear view mirror and I saw a red light behind me and when I seen the red light I pulled over to the right shoulder of the road as far as possible without getting in the ditch. He and another officer were together, walked up and asked me for my driver's license. Well, my car, the doors were not open from the outside, you have to open them from the inside and I opened the door and got out and showed them my driver's license. He asked me where I had started to and I told him that I had started to Haw River to see the man I had been working for, Mr. Jack Leach, and so he asked me if I worked for him regular and I told him I did not, that I just helped him sometimes and where I was employed at. When he said to walk back there that he wanted to talk to me, I walked behind him—he was in front of me—to the side and I walked back to his patrol car and he opened the back door and said to get in that he wanted to talk to me. I sat back there and he had a few words, I don't know what he said—he said, "You have been drinking, haven't you," and I told

him I had not. This other officer walked back to the car and Mr. Guy tells the other officer to get up there and see if anybody is in his car who can drive it, he said if there is, to bring the car on to the jailhouse.

Mr. Guy was sitting in the back of the automobile with me. The other officer come and got under the wheel and carried me on to jail, Mr. Guy—I explained to him—that I did not see where I was under any influence; in fact, he never even asked me what I had been drinking. He asked me had I been drinking and I told him no. I told him, I said that I have had my driver's license so many years and if I was a drinker or something I would have been arrested before now for driving drunk, and I said, if it is your opinion, I said there is a lady back there that I would just go on home, and he said, "No," and so when he got to the Courthouse he stopped at the circle out here, and he picked up another officer and so he carried me on to the jailhouse and booked me for driving drunk. The jailor there, the one that was on duty there that night, he said, "What have you got this boy for," and I said, "You see what they got me charged with," and I said that I wanted to get them to call Dr. Charles Kernodle and give me an alcoholic examination and I would pay for it. I did not get any response. So he called Mrs. Pauline Gerringer and she came over there and signed my bond, my car was parked out there in the jailhouse yard, the driveway. I went right out, got in my car and drove it on home, that was five minutes from the time he had arrested me until he carried me to jail. That is just what happened.

CROSS EXAMINATION

MR. ANDREWS: No Questions.

M. E. GUY, Graham Policeman, RECALLED, testified as follows:

REDIRECT EXAMINATION FOR THE STATE:

As far as I remember the other officer with me at the time was one of the auxiliary members, just happened to be working that night with me, and as far as sending him back to the car, I did not send him back. I went back and talked to the woman and asked if she had an operator's license and turned the car over to her and she drove it to the jail. He tried to get me to let her drive the car on from there said she could take care of the car all right. I wouldn't do it, I took him on with me. As far as the Doctor, I don't know anything about that, I never heard anything about the Doctor.

STATE RESTS.

CHARGE OF THE COURT

Members of the Jury: In this case the defendant Lacy Mathew Thompson is being tried upon a warrant which charges that on the 17th day of December 1960, he operated a motor vehicle on the public street of Graham, North Carolina, while under the influence of intoxicant,

He has entered a plea of "Not Guilty" to the charge and, therefore, comes into court presumed to be innocent of it and the burden is on the State to satisfy you beyond a reasonable doubt of his guilt before you will convict him.

A reasonable doubt is not an imaginary, fanciful or a possible doubt, but a doubt based on reason and common sense growing out of the evidence or lack of evidence in the case. To be satisfied beyond a reasonable doubt means to be fully satisfied or satisfied to a moral certainty.

Now, in order to convict the defendant, the State must satisfy you beyond a reasonable doubt that he was driving a motor vehicle on a public street of the Town of Graham at a time when he had drunk a sufficient quanity of intoxicating beverage to cause him to lose the normal control of his bodily or mental faculties or both to such an extent that there was an appreciable impairment of either one or both of these faculties.

The State offered evidence which tends to show that officer Guy saw the defendant late in the afternoon about six-thirty on December 17, 1960, that he was operating a 1949 Pontiac, that he turned to the left off of Main Street onto East Parker and that he followed him down to East Parker Street. (A) That the defendant was zig-zagging from one side of the street to the other. (B) The defendant excepts to the portion of the charge between the letters (A) and (B).

DEFENDANT'S EXCEPTION NO. 1.

That he got him out from under the wheel and in his opinion he was highly intoxicated, that he staggered and talked with a thick tongue.

The defendant's evidence tends to show that he wasn't under the influence, that he was not operating the vehicle from side to side or zig-zagging, that when the officer stopped him he asked for his driver's license, that he opened the door and got out and showed them to him, and that he was asked where he was going and what for and that he answered these questions and he was then taken to jail where he asked for a doctor to get a test for alcohol and that none was provided, and he summoned the bondsman and he gave bond and (C) left the jail very shortly after he was taken to it.

(D)

The defendant excepts to the portion of the charge between the letters (C) and (D).

DEFENDANT'S EXCEPTION NO. 2.

(E) Now if the State has satisfied you beyond a reasonable doubt that the defendant on the occasion in question was operating a motor vehicle on the public highway of this State, or a public street of the City of Graham at a time when he had drunk a sufficient quanity of intoxicating beverage to cause him to lose the normal control of his mental or bodily faculties, either one or the other, to such an extent that there was an appreciable impairment of either one or both, then it would be your duty to return a verdict of Guilty as Charged in the Warrant. (F)

The defendant excepts to the portion of the charge between the letters (E) and (F).

DEFENDANT'S EXCEPTION NO. 3.

If the State has failed to so satisfy you, it would be your duty to return a verdict of Not Guilty. The State contends your verdict should be Guilty as Charged and the defendant says he is Not Guilty. It is a question for you.

You may retire and make up your verdict.

The defendant excepts to the failure of the Court, after having recited the testimony of the officer that the defendant zig-zagged across the road, to also call to the attention of the jury the testimony of the officer that even though it was dark enough for car lights and the defendant met several cars he did not drive any off the road, as required by G. S. 1-180.

(DEFENDANT'S EXCEPTION NO. 4).

The defendant excepts to the failure of the Court, when reciting the testimony of the defendant that he left the jail very shortly after he was taken to it to include that

portion of his testimony to the effect that he did, and was permitted to, drive his car when he left as required by G. S. 1-180.

(DEFENDANT'S EXCEPTION NO. 5).

GROUPING OF EXCEPTIONS AND ASSIGNMENTS OF ERROR

1. The defendant assigns as error the action of the Court in reciting to the jury evidence to the effect that the defendant was zig-zagging from one side of the road to the other, without also reciting to the jury the evidence of the defendant that he met several cars and did not run them off the road, as shown by EXCEPTIONS NOS. 1 and 4. Herein grouped. (R pp 8 and 10)

2. The defendant assigns as error the action of the Court in reciting to the jury the defendant's evidence that he left the jail shortly after he was brought there without at the same time reciting his evidence to the effect that he did, and was permitted to, so leave by driving his car, as shown by EXCEPTIONS NOS. 2 and 5. Herein grouped. (R pp 9 and 10)

3. The defendant assigns as error that portion of the charge between the letters (E) and (F) wherein her Honor permitted the jury to find that the defendant was under the influence of intoxicating beverages when there was no evidence in the record that his intoxication was due to any intoxicating beverages, and permitted the jury to find that the street in Graham was a public street or highway when there was no evidence to that effect introducted below, as shown by EXCEPTION NO. 3 (R p 9).

4. The defendant excepts to the entry and signing of the judgment set forth in the record proper, as shown by defendant's EXCEPTION NO. 6 (R p 3)

ACKNOWLEDGMENT AND ACCEPTANCE OF SERVICE

Service of the foregoing Statement of Case on Appeal is hereby accepted and further service is waived and receipt of copy of same is acknowledged. It is further acknowledged and agreed that said Statement of Case on Appeal was filed in apt time and that the foregoing Statement of Case on Appeal has been served in apt time.

This 15th day of March 1962.

IKE F. ANDREWS, Solicitor.

FILED MARCH 15, 1962, 4:00 PM.
D. M. McLELLAND, C. S. C.

MOTION, IN SUPREME COURT, FOR ARREST OF JUDGMENT:

The defendant moves the Court to arrest the judgment for that the warrant charges the defendant, disjunctively, with having been under the influence of mutually inclusive substances without stating which of the respective commandments of the statutes he violated.

STIPULATION OF COUNSEL

It is hereby stipulated and agreed by and between the Solicitor and the Counsel for the defendant that the foregoing shall be and constitute the Case on Appeal to the Supreme Court of North Carolina in this cause.

IKE F. ANDREWS, Solicitor
CLARENCE ROSS
B. F. WOOD
W. R. DALTON
Attorneys for Defendant

CLERK'S CERTIFICATE

NORTH CAROLINA ALAMANCE COUNTY

I, D. M. McLELLAND, Clerk of the Superior Court of Alamance County, do hereby certify that the regular term of the Superior Court in and for Alamance County was held in January 1962, and the Honorable Susie Sharp was presiding Judge; that the case of LACY MATHEW THOMPSON was tried before Judge Susie Sharp and a duly constituted and impaneled jury, and the verdict rendered that defendant was guilty, and the Judgment rendered thereon appears in the record. That the defendant gave notice of appeal in open court to the Suprmem Court of North Carolina, and he was ordered to give appeal bond for costs in the sum of $150. and appearance bond in the sum of $1500.00, both of which have been done and approved by me, and the same are transmitted herewith:

I further certify that the foregoing 8 pages of the Record of Case on Appeal in the case of STATE v LACY MATHEW THOMPSON constitutes a true and accurate record of the official papers in said cause as the same appear on file in this office.

Witness my hand and official seal, this 9th day of April 1962.

D. M. McLELLAND, C. S. C. (SEAL)

JUDGMENT

SUPREME COURT OF NORTH CAROLINA

Spring Term 1962

No. 724—Alamance County

STATE

v.

LACY MATHEW THOMPSON

This cause came on to be argued upon the transcript of the record from the Superior Court Alamance County: Upon consideration whereof, this Court is of opinion that there is no error in the record and proceedings of said Superior Court.

It is therefore considered and adjudged by the Court here that the opinion of the Court, as delivered by the Honorable William H. Bobbitt Justice, be certified to the said Superior Court, to the intent that the proceedings be had therein in said cause according to law as declared in said opinion. And it is considered and adjudged further, that the defendant and surety to the appeal bond, Delacy Thompson and Cora Lee Thompson, do pay the costs of the appeal in this Court incurred, to wit, the sum of Forty and 05/100 dollars ($40.05); and execution issue therefor. Certified to Superior Court this 25th day of June 1962.

A TRUE COPY

(SEAL)

ADRIAN J. NEWTON
Clerk of the Supreme Court

By s/ Sarah B. Hanner
Sarah B. Hanner, Deputy Clerk

SUPREME COURT OF NORTH CAROLINA

STATE

v

LACY MATHEW THOMPSON

Appeal docketed	13 April 1962
Case argued	22 May 1962
Opinion filed	15 June 1962
Final judgment entered	15 June 1962

I, Adrian J. Newton, Clerk of the Supreme Court of North Carolina, do hereby certify the foregoing to be a full, true and perfect copy of the record and the proceedings in the above entitled case, as the same now appear from the originals on file in my office.

I further certify that the rules of this Court prohibit filing of petitions to rehear in criminal cases.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at office in Raleigh, North Carolina, this the 30 day of August, 1962.

(SEAL)

ADRIAN J. NEWTON
Clerk of the Supreme Court
of North Carolina

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Supreme Court of the United States

October Term, 1962

No. 432

LACY MATHEW THOMPSON
Petitioner

vs.

STATE OF NORTH CAROLINA
Respondent

BRIEF OF THE RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

October Term, 1962

No. 432

LACY MATHEW THOMPSON

Petitioner

vs.

STATE OF NORTH CAROLINA

Respondent

BRIEF OF THE RESPONDENT, STATE OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The Opinion of the Supreme Court of North Carolina in this case is reported as STATE v. THOMPSON, 257 N. C. 452 (No. 3, Advance Sheets of North Carolina, issued 13 July 1962); S.E.2d . This Opinion also appears in the Petitioner's petition for writ of certiorari at page 7.

JURISDICTION

The Petitioner invoked the jurisdiction of the Supreme Court of the United States pursuant to 28 U.S.C. 1257(3).

The Respondent, State of North Carolina, denies that this Court has been presented a sufficient basis for exercise of its jurisdiction. It is believed that the record of this case will show that no substantial Federal question has been

presented, that no Federal question was properly or timely raised by the Petitioner before the trial court, and that no Federal question was expressly passed upon by the Supreme Court of North Carolina.

STATE STATUTE

The Respondent, State of North Carolina, does not concede that any substantial Federal question has been properly raised by Petitioner as to the validity of the State statute (Sec. 20-138, General Statutes of North Carolina) under which the Petitioner was convicted. We believe this Court will agree when it examines the full Record and Transcript, as well as the Opinion of the Supreme Court of North Carolina, that the State Court did not pass upon any constitutional question. However, Petitioner having been convicted under this statute, we quote it below:

> "Persons under the influence of intoxicating liquor or narcotic drugs.—It shall be unlawful and punishable, as provided in §20-179, for any person, whether licensed or not, who is a habitual user of narcotic drugs or any person who is under the influence of intoxicating liquor or narcotic drugs, to drive any vehicle upon the highways within this State."

CONSTITUTIONAL PROVISION

The Respondent, State of North Carolina, does not concede that any Federal question has been decided by the Supreme Court of North Carolina nor that any Federal question involving the Constitution of the United States has been properly raised by Petitioner. Since, however, Respondent will answer arguments based on Sec. 1 of the Fourteenth Amendment of the Constitution of the United States, we quote this provision, as follows:

> "Fourteenth Amendment, Section 1
>
> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No

state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

The Respondent, State of North Carolina, submits the following as questions raised on this petition for writ of certiorari:

1. Did the Supreme Court of North Carolina pass upon and determine any Federal question that would confer jurisdiction on this Court?

2. Has the Petitioner been deprived of any rights or privileges guaranteed by Section 1 of the Fourteenth Amendment of the Constitution of the United States?

STATEMENT OF CASE

Petitioner was arrested on December 17, 1960, on the misdemeanor charge of unlawfully and wilfully operating a motor vehicle on the public streets of Graham, North Carolina, while under the influence of intoxicating liquors, bitters, morphine or other opiates. On January 19, 1961, he was tried in the Municipal Recorder's Court of Graham, North Carolina, upon warrant charging this offense, found guilty and given a four-month sentence suspended upon payment of one hundred dollars ($100.00) and costs. He appealed to the Superior Court of Alamance County, North Carolina, and upon trial de novo at the January 1962 Criminal Term of Superior Court of Alamance County, was found guilty and sentenced to confinement in the County jail for a period of eighteen (18) months to be assigned to work under the supervision of the State Prison Department. From the adverse verdict of the Alamance County Superior Court, a trial court of general jurisdiction, Petitioner appealed to the North Carolina Supreme Court. The Supreme Court of North Caro-

lina found no error in an Opinion filed June 15, 1962, and reported as STATE v. LACY MATHEW THOMPSON, 257 N. C. 452, S.E.2d

FACTS IN THE CASE

The evidence of the State consisted entirely of testimony of N. E. Guy, an officer of the Graham Police Department. He testified he observed the Petitioner operating a 1949 Packard automobile on North Main and East Parker Streets in Graham in the early morning of December 17, 1960. The automobile was zigzagging from one side of the street to the other. At the time of his arrest for driving under the influence Petitioner appeared glassy eyed, talked with a thick tongue and staggered when he walked. In Officer Guy's opinion the petitioner was highly intoxicated.

Petitioner appeared as the sole defense witness. He testified that he was driving the automobile at the time he was apprehended but that he had not been drinking.

ARGUMENT

1.

NO FEDERAL QUESTION WAS PRESENTED TO OR PASSED UPON BY THE NORTH CAROLINA SUPREME COURT

The Petitioner did not raise any Federal question before the trial court or the Supreme Court of North Carolina. He attempts for the first time in this Court to present matters which he alleges deprived him of constitutional rights guaranteed by the Fourteenth Amendment of the United States Constitution.

The decision of the North Carolina Supreme Court was made entirely on a nonfederal ground. In fact there was nothing before the North Carolina Supreme Court requiring it to pass upon any Federal constitutional question.

It is essential to Federal jurisdiction that any rights, privileges or immunities claimed be set up in the State Court and denied by its decisions.

BROOKS v. MISSOURI, 124 U.S. 394, 31 L. ed 454, 8 S. Ct. 443;

HARTFORD LIFE INS. CO. v. JOHNSON, 249 U. S. 490, 63 L. ed 722, 39 S. Ct. 336;

KEOKUK & HAMILTON BRIDGE CO. v. ILLINOIS, 175 U.S. 626, 44 L. ed. 299, 20 S. Ct. 205;

MUTUAL LIFE INS. CO. OF NEW YORK v. McGREW, 188 U.S. 291, 47 L. ed. 480, 23 S. Ct. 375;

PARKER v. McLAIN, 237 U.S. 469, 59 L. ed. 1051, 35 S. Ct. 632;

THOMAS v. IOWA, 209 U.S. 258, 52 L. ed. 782, 28 S. Ct. 487;

NEW YORK EX REL. COHN v. GRAVES, 300 U.S. 308, 81 L. ed. 666, 57 S. Ct. 466.

In PARKER v. McLAIN, 237 U.S. 469, 59 L. ed. 1051, 35 S. Ct. 632, on page 471, it is stated:

> "Our jurisdiction to review the judgment of the highest court of a state turns upon whether a Federal right was specially set up or claimed in that court and denied by its decision."

Petitioner cannot raise a Federal question for the first time in his jurisdictional statement. HIAWASSEE RIVER POWER CO. v. CAROLINA-TENNESSEE POWER CO., 252 U.S. 341, 344, 64 L. ed. 601, 40 S. Ct. 330; THOMAS v. IOWA, 209 U.S. 258, 52 L. ed. 782, 28 S. Ct. 487.

2.

THE SUPREME COURT OF NORTH CAROLINA DECIDED THIS CASE ON A NONFEDERAL GROUND AND THERE IS NO FEDERAL QUESTION FOR REVIEW BY THIS COURT.

Aside from Petitioner's failure to properly invoke the jurisdiction of this Court through a timely assertion of a right, privilege or immunity guaranteed by the Fourteenth Amendment to the United States Constitution, he has failed to raise any substantial Federal question. Both the questions presented by the Petitioner in his petition for writ of certiorari and the justification advanced for the issuance of the writ involve nonfederal matters. Even so, questions 2 and 3, as the record before this Court will reveal, were not presented to the North Carolina Supreme Court. They are raised for the first time in this Court.

As we have already pointed out, this Court will give consideration only to those questions that have been adjudicated by the State Court. In WHITLEY v. CALIFORNIA, 274 U.S. 357, 71 L. ed. 1095, 47 S. Ct. 641, Mr. Justice Brandeis explained the reviewing power of this Court in his concurring opinion, as follows:

> "Our power of review in this case is limited not only to the question whether a right guaranteed by the Federal Constitution was denied (Murdock v. Memphis, 20 Wall. 590, 22 L. ed. 429; Montana ex rel. Haire v. Rice, 204 U.S. 291, 301, 51 L. ed. 490, 495, 27 Sup. Ct. Rep. 281); but to the particular claims duly made below, and denied (Seaboard Air Line R. Co. v. Duval, 225 U. S. 477, 485-488, 56 L. ed. 1171, 1175, 1176, 32 Sup. Ct. Rep. 790). We lack here the power occasionally exercised on review of judgments of lower federal courts to correct in criminal cases with errors, although the objection was not taken in the trial court. Wiborg v. United States, 163 U.S. 632, 658-660, 41 L. ed. 289, 298, 299, 16 Sup. Ct. Rep. 1127, 1197; Clyatt v. United States, 197 U.S. 207, 221, 222, 49 L. ed. 726, 731, 732, 25 Sup. Ct. Rep. 429. This is a writ of error to a state court. Because we may not inquire into the errors now alleged, I concur in affirming the judgment of the state court."

In YAKUS v. UNITED STATES, 321 U.S. 414, 88 L. ed. 834, 64 S. Ct. 660, in speaking of the timely assertion of alleged constitutional rights, this Court said:

> "No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in

criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it. O'Neil v. Vermont, 144 U.S. 323, 331, 36 L. ed. 450, 455, 12 S. Ct. 693; Barbour v. Georgia, 249 U.S. 454, 460, 63 L. ed. 704, 707, 39 S. Ct. 316; Whitney v. California, 274 U.S. 357, 360, 362, 380, 71 L. ed. 1095, 1099, 1100, 1107, 47 S. Ct. 641. Courts may for that reason refuse to consider a constitutional objection even though a like objection had previously been sustained in which it was properly taken. Seaboard Air Line R. Co. v. Watson, 287 U.S. 86, 77 L. ed. 180, 53 S. Ct. 32, 86 ALR 174. While this Court in its discretion sometimes departs from this rule in cases from lower federal courts, it invariably adheres to it in cases from state courts, see Brandeis, J. concurring in Whitney v. California, supra (274 U.S. 380, 71 L. ed. 1107, 47 S. Ct. 641), and it could hardly be maintained that it is beyond legislative power to make the rule inflexible in all cases. Compare Woolsey v. Best, 299 U.S. 1, 81 L. ed. 3, 57 S. Ct. 2, with Ex parte Siebold, 100 U.S. 371, 25 L. ed. 717."

We will not burden this brief with further discussion of this question but we do refer the Court to certain cases which sustain our position that the State Court must be given an opportunity to pass upon alleged constitutional questions before this Court will charge it with any errors in regard to such matters.

See:

UNITED STATES v. SPECTOR, 343 U.S. 169, 96 L. ed. 863, 72 S. Ct. 591;

SPIES v. ILLINOIS, 123 U.S. 131, 31 L. ed. 80, 8 Ct. 21;

BROOKS v. MISSOURI, 124 U.S. 394, 31 L. ed. 454, 8 S. Ct. 443;

BALDWIN v. KANSAS, 129 U.S. 52, 32 L. ed. 640, 9 S. Ct. 193;

MORRISON v. WATSON, 154 U.S. 111, 38 L. ed. 927, 14 S. Ct. 995;

ERIE R. CO. v. PURDIE, 185 U.S. 148, 46 L. ed 847, 22 S. Ct. 605;

LAYTON v. MISSOURI, 187 U.S. 356, 47 L. ed. 214, 23 S. Ct. 137;

LOUISVILLE & N. R. CO. v. WOODFORD, 234 U.S. 46, 58 L. ed. 1202, 34 S. Ct. 739;

WILSON v. COOK, 327 U.S. 474, 90 L. ed. 793, 66 S. Ct. 663;

WILLIAMS v. GEORGIA, 349 U.S. 375, 99 L. ed. 1161, 75 S. Ct. 814;

PARKER v. ILLINOIS, 333 U.S. 571, 92 L. ed. 886, 68 S. Ct. 708;

PENNSYLVANIA R. CO. v. ILLINOIS BRICK CO., 297 U.S. 447, 462, 463, 80 L. ed. 769, 56 S. Ct. 556;

BAILEY v. ANDERSON, 326 203, 90 L. ed. 3, 66 S. Ct. 66.

Even the most cursory perusal of the evidence discloses that there is no factual basis for Petitioner's contention that his conviction was so totally devoid of evidentiary support as to raise a due process issue. Petitioner made no motion for nonsuit in the trial court and under State practice is deemed to have conceded its sufficiency to sustain the charge. STATE v. GASTON, 236 N.C. 499, 73 S.E. 2d 311; STATE v. JACKSON, 226 N.C. 760, 40 S.E. 2d 417. While he did question as prejudicial an instruction of the Court which permitted the jury to find that he was under the influence of an intoxicating beverage, the North Carolina Supreme Court found there was sufficient evidence to support the challenged instruction.

We contend that GRUNDLER v. STATE OF NORTH CAROLINA, 283 F. 2d 798 (1960), is in point and that the following language from the opinion in that case, at p. 801, should apply to the instant case:

"The appellants also maintain that the evidence furnished an insufficient basis for conviction. . . . They argue that this case is governed by Thompson v. City of Louisville, 1960, 362 U.S. 199, 206, 80 S. Ct. 624, 629, 4 L. Ed. 2d 654, where the Supreme Court held it a denial of due process for a state to convict someone upon no evidence of guilt. The Court said:

> 'Thus we find no evidence whatever in the record to support these convictions. Just as "Conviction upon a charge not made would be a sheer denial of due process," so is it a violation of due process to convict and punish a man without evidence of his guilt.'

"We think that the transcript of the trial demonstrates that the evidence was sufficient. Even if we entertained doubts about this, there would be no basis for a federal court in a habeas corpus proceeding to undertake a broad review of the conviction in the state court. There is a difference between a conviction based upon evidence deemed insufficient as a matter of state criminal law, and one so totally devoid of evidentiary support as to raise a due process issue. It is only in the latter situation that there has been a violation of the Fourteenth Amendment, affording the state prisoner a remedy in a federal court on a writ of habeas corpus.

"Certainly, in this case, there was substantial evidence against the petitioners. . . . The evidence against the appellants was obviously not so slight as to raise a constitutional issue, and Thompson v. City of Louisville, supra, is not applicable."

Even if the North Carolina Supreme Court or the North Carolina trial court made errors in State law, which is denied, no Federal constitutional question would be presented.

The point raised by the Petitioner in this case was decided by the Court in BUCHALTER v. NEW YORK, 319 U.S. 427, 87 L. ed. 1492, 63 S. Ct. 1129, where this Court said on this point, the following:

"The petitioners insist that the rulings upon evidence and instructions to the jury when taken in their totality,

indicate that whatever the intention of the trial judge, his rulings and attitude precluded a fair consideration of the case. The Court of Appeals held that certain of the challenged rulings and instructions were erroneous but that the errors were not substantial in the sense that they affected the ability of the jury to render an impartial verdict, and that others of the alleged errors were not such under the law of New York. As already stated, the due process clause of the Fourteenth Amendment does not enable us to review errors of state law however material under that law. We are unable to find that the rulings and instructions under attack constituted more than errors as to state law. We cannot say that they were such as to deprive the petitioners of a trial according to the accepted course of legal proceedings."

In AMERICAN RAILWAY EXPRESS CO. v. KENTUCKY, 273 U.S. 269, 71 L. ed. 639, 47 S. Ct. 353, it is said at p. 273:

> "It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law."

Errors of a State Court in interpreting and applying the laws of that state furnish no basis for the claim that there has been a denial of due process of law guaranteed by the Fourteenth Amendment to the Federal Constitution. The Constitution of the United States does not guarantee that the decisions of State Courts shall be free from error or require that their pronouncements shall be consistent.

DAVIS v. TEXAS, 139 U.S. 651, 35 L. ed. 300, 11 S. Ct. 675;

HOWARD v. KENTUCKY, 200 U.S. 164, 50 L. ed. 421, 26 S. Ct. 189;

WORCHESTER COUNTY TRUST CO. v. RILEY, 302 U.S. 292, 82 L. ed 268, 58 S. Ct. 185;

MILLER v. TEXAS, 153 U.S. 535, 38 L. ed. 812, 14 S. Ct. 874;

CARTER v. ILLINOIS, 329 U.S. 173, 91 L. ed. 172, 67 S. Ct. 216.

When a State Court judicially determines that there is sufficient evidence of a fact to be submitted to a jury, its decision is not reviewable by the United States Supreme Court on writ of certiorari.

NOBLE v. MITCHELL, 164 U.S. 367, 41 L. ed. 472, 17 S. Ct. 110;

AMERICAN RAILWAY EXP. CO. v. KENTUCKY, 273 U.S. 269, 71 L. ed. 639, 47 S. Ct. 353;

BELL TELEPHONE CO. v. PENNSYLVANIA PUBLIC UTILITY COMMISSION, 309 U.S. 30, 84 L. ed. 563, 60 S. Ct. 411.

In BELL TELEPHONE CO. v. PENNSYLVINA PUBLIC UTILITY COMMISSION, 309 U.S. 30, 32, 84 L. ed. 563, 60 S. Ct. 411, it is stated in a *per curiam* opinion:

> "As to the first contention, it appears that the State court heard the appeal judicially and decided that there was evidence justifying the finding of the Commission of unreasonable discrimination in the transaction of its intrastate business. In the absence of other constitutional objections, it cannot be said that a state court denies due process when on appropriate hearing it determines that there is evidence to sustain a finding of the violation of state law with respect to the conduct of local affairs. The contention that such a decision is erroneous does not present a federal question."

The following paragraph from the opinion of Justice White in NOBLE v. MITCHELL, 164 U.S. 367, 373, 41 L. ed. 472, 17 S. Ct. 110, would seem to be decisive of the question:

> "It is suggested that there is no adequate proof that the policy in controversy was issued by a foreign corporation. This involves a mere question of fact, which was submitted to the jury by the trial court, and as to which the Supreme Court of Alabama said there was evidence sufficient for the consideration of the jury, and which

is not subject to review here on writ of error. DOWER v. RICHARDS, 151 U.S. 659 (38:306); RE BUCHANAN, 158 U.S. 31 (39:884)."

It it should be determined that the Supreme Court of North Carolina erroneously decided the case, no question would be presented for determination by this Court for it has long been held that where a party is fully heard in the regular course of judicial proceedings, an erroneous decision of the State Court is not a denial of due process within the Fourteenth Amendment of the Constitution of the United Sates.

BONNER v. GORMAN, 213 U.S. 86, 53 L. ed. 709, 29 S. Ct. 483;

AMERICAN RAILWAY EXPRESS CO. v. KENTUCKY, 273 U.S. 269, 71 L. ed. 639, 47 S. Ct. 353;

WEST OHIO GAS CO. v. PUBLIC UTILITIES COMMISSION, 294 U.S. 63, 79 L. ed. 761, 55 S. Ct. 316.

CONCLUSION

The Respondent, State of North Carolina, believes that it has shown the Court that on the Record of this case that no Federal question exists, that no Federal question was raised below in the State Court and that no Federal question was expressly passed upon by the Supreme Court of North Carolina, and, therefore, this Court does not have jurisdiction.

Respondent asks this Court to refuse to grant writ of certiorari.

Respectfully submitted,

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